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## Fundamental Versus Deferential: Appellate Review of Terminations of Parental Rights

KAREN A. WYLE\*

Any attorney who handles or follows cases involving termination of parental rights will have often read, “This court has long had a highly deferential standard of review in cases concerning the termination of parental rights.”<sup>1</sup> This article addresses several questions that arise from that familiar language:

- Does the Indiana Court of Appeals in fact have a tradition or practice of highly deferential review of termination orders?
- Is this deference greater than the court accords to trial court decisions in other family law matters or in non-family civil appeals?
- If so, on what legal analysis is this special deference based?
- Is it appropriate to give more deference to a trial court’s decision to forever sever the bonds between parent and child than to other trial court decisions, in and outside the area of family law?

As shown below, the court is in fact significantly more likely to affirm termination orders than any other kind of civil judgments, including judgments in other family law matters. The Rules of Appellate Procedure also operate to increase the difficulties encountered in appeals of termination orders. This especially unfavorable treatment, however, rests on the slenderest of legal foundations and raises grave constitutional concerns. The challenge is to find an effective and practical way to move toward an appropriate level of appellate scrutiny in termination appeals.

### I. AFFIRMANCE VS. REVERSAL RATES IN THE VARIOUS TYPES OF CIVIL APPEALS

The threshold question to be determined is whether, in fact, the Indiana Court of Appeals gives any special deference to trial court decisions to terminate parental rights. A review of Indiana Court of Appeals decisions, both published and unpublished, from March 1, 2008, through November 30, 2009,<sup>2</sup> reveals the following:

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1. See, e.g., *In re K.S.* 750 N.E.2d 852, 856 (Ind. Ct. App. 2001).

2. See *Indiana Appellate opinions Archive – Appeals*, Indiana Courts, IN.GOV/JUDICIARY, available at <http://www.ai.org/judiciary/opinions/archapp.html> [hereinafter *Appellate Opinions Archive*]. Official statistics showing the reversal rate in Indiana Court of Appeals decisions in different sorts of civil appeals do not appear to be available. The following tables are based on a review of decisions accessible through the court’s archived opinions, available online at <http://www.ai.org/judiciary/opinions/archapp.html>, for the dates indicated. (The tabulated cases do not include opinions on rehearing.) These tables do not represent highly rigorous or technically unassailable methods. The occasional clerical error in recording decisions is not only possible, but likely. Others reviewing the same cases might come to different conclusions as to whether a reversal was primarily on substantive or on procedural grounds, or whether a case should be categorized as “family law” or “non-family civil.” Others might divide the decisions into different,

	Total	Affirmed	Reversed/ Partially Reversed/ Remanded, Substantive Grounds	Reversed/Partially Reversed/Remanded, Procedural Grounds
Civil Not Family Law, Published	477	267	160	50
Civil Not Family Law, Not Published	492	362	97	33
Family Law Not TPR, Published	91	38	42	11
Family Law Not TPR, Not Published	272	184	71	17
TPR, Published	25	16	5	4
TPR, Not Published	198	194*	3	1

\*The Indiana Supreme Court reversed one of these memorandum decisions in *In re G.Y.*<sup>3</sup>

Those numbers converted into approximate percentage terms are as follows:

	Total	Affirmed	Reversed/Partially Reversed/ Remanded, Substantive Grounds	Reversed/Partially Reversed/Remanded, Procedural Grounds
Civil Not Family Law, Published	477	56%	33.5%	10.5%
Civil Not Family Law, Not Published	492	73.6%	19.7%	6.7%
Family Law Not TPR, Published	91	41.8%	46.2%	12.1%
Family Law Not TPR, Not Published	272	67.65%	26.1%	6.25%
TPR, Published	25	64%	20%	16%
TPR, Not Published	198	98%	1.5%	0.5%

possibly more illuminating, categories. A more determined researcher might include decisions back to August 21, 2006, when the court apparently began making unpublished memorandum decisions available online (see <http://www.in.gov/judiciary/opinions/nfp.html>) or might find some methodology that would include published decisions before that date. These tables are intended only to provide a first, rough overview that could either support or rebut the proposition that the court is more deferential in termination cases.

3. *In re G.Y.*, 904 N.E.2d 1257 (Ind. 2009).

Those numbers divided more generally are as follows:

	Total	Affirmed (numbers)	Affirmed (percentages)
All Civil Not Family Law	969	629	64.91%
All Family Law Not TPR	363	222	61.16%
All Termination of Parental Rights	223	210	94.17%

First, we see that in civil cases other than termination cases slightly fewer than two-thirds of all judgments are affirmed. Breaking down these numbers, one might expect that decisions in family law cases would be affirmed more often than in other civil cases. After all,

[O]ur supreme court has expressed a “preference for granting latitude and deference to our trial judges in family law matters.” *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind. 1993). The rationale for this deference is that appellate courts “are in a poor position to look at a cold transcript of the record, and conclude that the trial judge . . . did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.” *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (citation omitted).<sup>4</sup>

However, if one excludes termination cases, we see that in the sample period *fewer* family law judgments were affirmed than other civil judgments: 61.16% (41.76% of published and 67.65% of unpublished decisions) versus 64.91% (55.97% of published and 73.77% of unpublished decisions).

Only in termination appeals is the rhetoric of deference to the trial court fully matched by the reality. Within the sample, the court of appeals affirmed almost 95% of all orders terminating parental rights (64% of published and a whopping 97.98%—194 out of 198—of unpublished decisions).<sup>5</sup> Of the 13 termination orders that the court reversed, 5 were reversed for procedural reasons, such as the ill-timed withdrawal of counsel<sup>6</sup> or inadequate notice of the termination hearing<sup>7</sup>—leaving

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4. *Paternity of J.J.*, 911 N.E.2d 725, 728 (Ind. Ct. App. 2009); *see also* *Walker v. Nelson*, 911 N.E.2d 124, 127 (Ind. Ct. App. 2009); *Apter v. Ross*, 781 N.E.2d 744, 757 (Ind. Ct. App. 2003).

5. For all types of cases, reversals are more likely in published than in unpublished cases. Publication is much less frequent in termination cases than in all other civil cases. Whether this introduces a bias against reversals, based on something other than the nature of termination cases, depends on whether the frequency of publication is linked to the infrequency of reversals in these cases.

6. *K.S. v. Marion Cnty. Dep’t of Child Servs.*, 917 N.E.2d 158, 164-65 (Ind. Ct. App. 2009).

7. *R.T. v. Dep’t of Child Servs.*, 911 N.E.2d 577, 578 (Ind. Ct. App. 2008).

only 8 out of 223 termination orders (5 in published cases, 3 in unpublished) reversed on such grounds as insufficient evidence.<sup>8</sup>

In addition to this track record, we may look at the unique treatment given to termination appeals in the Indiana Rules of Appellate Procedure. Indiana Appellate Rule 35 governs motions for extensions of time.<sup>9</sup> Subsection (C) is titled Proceedings in Which Extensions are Prohibited and reads as follows:

No motion for extension of time shall be granted to file a Petition for Rehearing, a Petition to Transfer to the Supreme Court, any brief supporting or responding to such Petitions, *or in appeals involving termination of parental rights*.<sup>10</sup>

Prior to 2007, termination appeals were treated the same way as “appeals involving worker’s compensation, issues of child custody, support, visitation, paternity, adoption, [and] determination that a child is in need of services.”<sup>11</sup> Extensions of time were only available for such appeals “in extraordinary circumstances.”<sup>12</sup> Where termination appeals were concerned, this was in accord with the recommendations of the National Council of Juvenile and Family Court Judges’ Adoption and Permanency Guidelines.<sup>13</sup> Effective January 1, 2007, termination appeals were removed from Rule 35(D) and were relegated to Rule 35(C), which until then had prohibited extensions of time only for Petitions for Rehearing, Transfer or Review<sup>14</sup>, or briefs supporting such petitions. In termination cases, but in no other sort of appeal, if the rule is taken at face value,<sup>15</sup> there are no circumstances that will result in an extension of time to file a brief or other paper.

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8. The numbers are similar following the sample period. *See Appellate Opinions Archive*, *supra* note 2. Between November 30, 2009, and November 23, 2010, the court of appeals issued decisions in 118 appeals of termination orders. Four were published opinions, two affirming and two reversing. Of the 114 unpublished memorandum decisions, 113 affirmed the termination of parental rights, with the sole reversal coming on procedural grounds. One of these unpublished decisions, issued December 10, 2009, was reversed on transfer. *In re I.A.*, No. 62S01-1003-JV-148, slip op. (Ind. Oct. 5, 2010).

9. IND. R. APP. P. 35.

10. IND. R. APP. P. 35(C) (emphasis added).

11. IND. R. APP. P. 35(D) (2006) (repealed 2007).

12. *Id.*

13. NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, ADOPTION AND PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES, 38–39 (2000).

14. The current rule concerning extensions of time for petitions for review is Ind. Appellate Rule 63(K).

15. Whether this rule is being uniformly and strictly enforced is a question for another researcher. However, in one termination appeal where circumstances strongly supported an extension of time to file a brief, and where the appellant challenged the constitutionality of Rule 35(C) if applied, the court essentially reset the 30-day clock, giving the appellant 30 days from the time when counsel obtained access to certain portions of the Clerk’s record. *See Stedman v. Greene County Dept. of Child Services*, No. 28A05-0707-JV-361, 2008 WL 732573 (Ind. Ct. App. Mar. 20, 2008) (referenced order issued Sept. 18, 2007).

## II. PRECEDENT OR RATIONALE FOR SPECIAL DEFERENCE

What, then, is the basis for this special deference to trial court determinations in termination appeals?

The case most often cited for the court's deferential standard of review is *In re K.S.*<sup>16</sup> In fact, since *K.S.* was published, every decision this author has found, published or unpublished, setting forth this deferential standard of review relies on *K.S.* or on a case that is derived directly from *K.S.*<sup>17</sup>

The key language in *K.S.* is the statement that “[the court of appeals] has long had a highly deferential standard of review in cases concerning the termination of parental rights.”<sup>18</sup> *K.S.* does not cite any case immediately following this statement.<sup>19</sup> Shortly thereafter, it cites a single case, *In re L.S.*<sup>20</sup> *L.S.* is a termination appeal, but it does not describe any longstanding tradition of singling out termination cases for special deference.<sup>21</sup> *L.S.* states that “[i]n deference to the trial court's unique position to assess the evidence, we set aside the judgment terminating a parent-child relationship only if it is clearly erroneous.”<sup>22</sup> This is language similar to that found in other family law cases and indeed in every type of Indiana appeal.<sup>23</sup>

*L.S.* cites *Egly v. Blackford County Dep't of Public Welfare*,<sup>24</sup> also a termination appeal, which states that “[w]here the trial court has heard the evidence and has had the opportunity to judge the credibility of witnesses, we will not set aside the judgment unless it is clearly erroneous.”<sup>25</sup> *Egly* is better known for overruling what had been the standard for termination of parental rights, namely that parental

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16. See generally *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001).

17. E.g., *In re I.A.*, 903 N.E.2d 146, 152–53 (Ind. Ct. App. 2009); *R.W., Sr. v. Marion Cnty. Dep't of Child Servs.*, 892 N.E.2d 239, 244 (Ind. Ct. App. 2008); *In re L.B.*, 889 N.E.2d 326, 336 (Ind. Ct. App. 2008); *In re A.B.*, 888 N.E.2d 231, 235 (Ind. Ct. App. 2008); *In re A.J.*, 877 N.E.2d 805, 815 (Ind. Ct. App. 2007); *Rowlett v. Vanderburgh Cnty. Office of Family and Children*, 841 N.E.2d 615, 620 (Ind. Ct. App. 2006); . For cases citing these *K.S.*-derived cases, see, e.g., *L.B. v. Indiana Dep't of Child Servs.*, No. 42A01-0906-JV-267 at 6 (Nov. 30, 2009); *T.J. v. Indiana Dep't of Child Servs.*, No. 49A02-0812-JV-1071 at 8 (June 5, 2009); *Elizabethe G. v. Dep't of Child Servs.*, 906 N.E.2d 248, 250–51 (Ind. Ct. App. 2009); *In re Involuntary Termination of the Parent-Child Relationship of A.R.*, No. 49A02-JV-360 at 12 (Feb. 27, 2007).

18. *In re K.S.*, 750 N.E.2d at 836.

19. *Id.*

20. *Id.* See generally *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999).

21. *In re L.S.*, 717 N.E.2d at 208.

22. *Id.*

23. See, e.g., *Bowles v. Bowles*, 261 N.E.2d 228, 230 (Ind. 1970); *Ruse v. Bleeke*, 914 N.E.2d 1, 7–8 (Ind. Ct. App. 2009) (quoting Ind. Trial Rule 52(A)); *State v. Holley*, 899 N.E.2d 31, 33 (Ind. Ct. App. 2008); *Atterholt v. Robinson*, 872 N.E.2d 633, 639 (Ind. Ct. App. 2007); *Rogers v. Rogers*, 876 N.E.2d 1121, 1126–27 (Ind. Ct. App. 2007); *Apter v. Ross*, 781 N.E.2d 744, 757 (Ind. Ct. App. 2003).

24. *In re L.S.*, 717 N.E.2d at 208.

25. *Egly v. Blackford Cnty. Dep't of Public Welfare*, 592 N.E.2d 1232, 1234–35 (Ind. 1992).

custody must be “wholly inadequate for [the children’s] very survival.”<sup>26</sup> *Egley* cites *In re Wardship of B.C.*,<sup>27</sup> another termination appeal. *B.C.* states the

well established and acknowledged rule that when we review *a case* in which a trial court has rendered findings of fact and conclusions of law, we will not set aside that court’s judgment unless it is clearly erroneous. Furthermore, we will neither reweigh the evidence nor reassess the credibility of the witnesses. To do otherwise would be to substitute our judgment for that of the trial judge.<sup>28</sup>

This chain of cases does no more than invoke, in the termination context, the usual Indiana standard for appellate review of factual findings.<sup>29</sup>

Research has not disclosed any Indiana case law prior to *K.S.* comparable to the key language in *K.S.* or on which *K.S.* could reasonably be said to rely without attribution—let alone any case thoroughly discussing and analyzing the issue.

It thus appears that Indiana case law provides no special justification for deferring substantially more to trial court orders terminating parental rights than to other trial court judgments that rely on evidence and witnesses.<sup>30</sup> Yet as we have seen, that is what routinely takes place.

### III. APPROPRIATE LEVEL OF APPELLATE SCRUTINY IN TERMINATION APPEALS

Whether or not Indiana’s current approach to termination appeals is based on a considered analysis, is there anything wrong with it? Should termination appeals be treated differently from other civil and/or family law appeals—either as they now are or in some other way?

These are appeals from the termination—the permanent and complete deprivation—of parental rights.<sup>31</sup> The Supreme Court has spoken repeatedly and

26. *See id.* at 1234.

27. *Id.* *See generally In re Wardship of B.C.*, 441 N.E.2d 208 (Ind. 1982).

28. *In re Wardship of B.C.*, 441 N.E.2d. at 211 (emphasis added).

29. *See, e.g., Canteen Service Company of Indianapolis, Inc. v. Indiana Dep’t of Transportation*, 932 N.E.2d 749, 751 (Ind. Ct. App. 2010).

30. *In re Johnson.*, 690 N.E.2d 716, 721 (Ind. Ct. App. 1998), refers to the court’s “deferential standard of review,” but does not state that this standard applies especially in termination cases, let alone justify such a distinction.

31. Theoretically, the same standards apply if the State appeals a trial court’s refusal to terminate parental rights. Practically speaking, this situation rarely arises in Indiana. (For examples—possibly the only examples—of such appeals, see *In re J.M.*, 908 N.E.2d 191 (Ind. 2009); *Crawford Cnty. Dep’t, of Child Servs. v. T.G.*, No. 13A05-0807-JV-414 (Ind. Ct. App. Nov. 26, 2008); see also *Marion Cnty. Office of Family and Children v. Qualls*, 745 N.E.2d 904 (Ind. Ct. App. 2001), remanded in part to determine whether the trial court denied or simply ignored the petition to terminate the father’s rights.) Whether the paucity of State appeals in termination cases reflects the rarity of State losses at trial, or some other factor, is unclear. In the states, *see infra* text accompanying notes 52–60, where trial court decisions in termination cases are reviewed de novo, the State is sometimes the one to benefit from such review—particularly in Oregon, where trial courts seem to be more reluctant to terminate parental rights.

eloquently about the fundamental and constitutionally protected nature of parental rights:

*Lassiter* declared it “plain beyond the need for multiple citation” that a natural parent’s “desire for and right to ‘the companionship, care, custody, and management of his or her children’” is an interest far more precious than any property right. 452 U.S., at 27, quoting *Stanley v. Illinois*, 405 U.S., at 651. When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. “If the State prevails, it will have worked a unique kind of deprivation. . . . A parent’s interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.” 452 U.S., at 27.

. . . Few forms of state action are both so severe and so irreversible.<sup>32</sup>

. . . The importance of this interest cannot easily be overstated. Few consequences of judicial action are so grave as the severance of natural family ties. Even the convict committed to prison and thereby deprived of his physical liberty often retains the love and support of family members.<sup>33</sup>

This language has been echoed in other relevant case law:

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one’s children have been deemed “essential,” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), “basic civil rights of man,” *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and “[r]ights far more precious . . . than property rights,” *May v. Anderson*, 345 U.S. 528, 533 (1953). . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska*, *supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, *supra*, at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).<sup>34</sup>

These principles are far from new, and as the Supreme Court has noted, they relate to some of the most historically significant liberty interests.

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.<sup>35</sup>

These cases are not speaking solely of the parent’s, but of the child’s familial rights. “[T]he child and his parents share a vital interest in preventing erroneous

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32. *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (omission in original).

33. *Id.* at 787 (Rehnquist, J., dissenting).

34. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (omission added).

35. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).



termination of their natural relationship”<sup>36</sup> While the State and the child share an obvious interest in protecting the child’s welfare and safety, “the State registers no gain towards its declared goals when it separates children from the custody of fit parents.”<sup>37</sup>

A customary justification for termination proceedings is the child’s need for stability, which is thought to be best served by a permanent and final disposition.<sup>38</sup> However, termination may not lead to any permanent and stable environment. While the State must show that it has “a satisfactory plan for the care and treatment of the child,”<sup>39</sup> this plan “need not be detailed, so long as it offers a general sense of the direction in which the child will be going after the parent-child relationship is terminated.”<sup>40</sup> In particular, the State is not required to show that there is an adoptive home waiting—it is sufficient under current case law if the State intends to *attempt* adoptive placement.<sup>41</sup>

Aside from the subject matter, we must consider the trial court proceedings that have culminated in the termination appeal. Are they more likely than other civil proceedings to result in fair and accurate findings and conclusions? In *Santosky*, a case involving due process issues that arise in termination hearings, the Supreme Court lists factors that suggest otherwise:

At such a proceeding, numerous factors combine to magnify the risk of erroneous factfinding. Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.

. . . [T]he primary witnesses at the hearing will be the agency’s own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even

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36. *Santosky*, 455 U.S. at 760.

37. *Stanley v. Illinois*, 405 U.S. at 652.

38. See, e.g., *In re A.J.*, 877 N.E.2d 805 (Ind. Ct. App. 2007); *McBride v. Monroe Cnty. Office of Family and Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). The Court of Appeals has held that while “stability of environment is an important factor. . . this in and of itself is not a valid basis for terminating the relationship between the natural parent and the children.” *Rowlett v. Vanderburgh Cnty. Office of Family and Children*, 841 N.E.2d 615, 623 (Ind. Ct. App. 2006); see also *In re H.T.*, 901 N.E.2d 1118, 1122 (Ind. Ct. App. 2009) (quoting *Rowlett v. Vanderburgh Cnty. Office of Family and Children*, 841 N.E.2d 615, 623 (Ind. Ct. App. 2006)).

39. IND. CODE § 31-35-2-4(b)(2)(D) (2010).

40. *In re B.D.J.*, 728 N.E.2d 195, 204 (Ind. Ct. App. 2000); see also *In re D.D.*, 804 N.E.2d 258, 268 (Ind. Ct. App. 2004).

41. *In re B.D.J.*, 728 N.E.2d at 204; *Lang v. Stark Cnty. Office of Family and Children*, 861 N.E.2d 366, 375 (Ind. Ct. App. 2007).

has the power to shape the historical events that form the basis for termination.<sup>42</sup>

The dissenting Justices in *Santosky* defended the New York procedures at bar, pointing out that New York's practice was to assign a single judge to handle the case "from the initial temporary removal of the child to the final termination of parental rights."<sup>43</sup> Thus, "decisions in termination cases are made by judges steeped in the background of the case and peculiarly able to judge the accuracy of evidence placed before them."<sup>44</sup> Whether in fact the judges, despite their large caseloads and the possible use of commissioners or magistrates, had such detailed knowledge of each case is perhaps debatable. In Indiana, according to knowledgeable practitioners, while it is common to assign all juvenile cases to a single judge, there are frequently different commissioners or magistrates handling the CHINS (Child in Need of Services) phase and the termination phase. Nor would the assignment of a single judge address the other factors identified by the *Santosky* majority: the imprecise nature of the key factual determinations, the resulting likelihood of subjective judgment, and the State's role in shaping events and evidence.

*Santosky* concerned the standard of proof to be applied in termination hearings, mandating at least a clear and convincing evidence standard.<sup>45</sup> Indiana has, of course, adopted this standard.<sup>46</sup> However, a standard of proof loses much of its value if a reviewing court does not apply sufficient scrutiny to enforce it. Due process in termination cases, as much as or more than other civil cases, depends upon "the error-reducing power of . . . appellate review."<sup>47</sup> Applying a more deferential standard in termination appeals dilutes that power.

Deference to the trial court's decision is certainly easier and faster than is careful scrutiny of the court's conclusions.

But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.<sup>48</sup>

#### IV. ALTERNATIVES

There are several possibilities for ensuring that orders terminating parental rights receive adequate appellate scrutiny. The least complex, though not necessarily the easiest to implement, is simply to acknowledge that there is no sufficient basis for the "highly deferential" standard of review and to treat

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42. *Santosky v. Kramer*, 455 U.S. 745, 762–63 (1982) (citations and footnotes omitted).

43. *Id.* at 786 n.12 (Rehnquist, J., dissenting).

44. *Id.*

45. *Id.* at 746.

46. IND. CODE § 31-34-12-2 (2010).

47. *Santosky*, 455 U.S. at 776 n. 4 (Rehnquist, JJ, dissenting).

48. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

termination appeals like most other appeals. The latter element involves changing the habits or culture at the court.<sup>49</sup>

Alternately, Indiana could acknowledge the fundamental nature of the relationships at stake by affording termination appeals greater scrutiny than appeals generally receive. This could be accomplished by judicial decision, statute, or rulemaking.

Under Indiana Appellate Rule 4(A)(1), the Indiana Supreme Court, rather than the court of appeals, has mandatory and exclusive jurisdiction over the following cases:

- (a) Criminal Appeals in which a sentence of death or life imprisonment without parole is imposed under Ind. Code § 35-50-2-9 and Criminal Appeals in post conviction relief cases in which the sentence was death.
- (b) Appeals of Final Judgments declaring a state or federal statute unconstitutional in whole or in part.
- (c) Appeals involving waiver of parental consent to abortion under Rule 62.
- (d) Appeals involving mandate of funds under Trial Rule 60.5(B) and Rule 61.<sup>50</sup>

The appeals covered in subsection (c) are in some ways comparable to termination appeals, in that they involve aspects of parental rights; although in other ways—in particular, the need for the utmost speed in reaching a final resolution—they are distinguishable. Termination appeals could conceivably be added to this list.

One important, and probably decisive, objection to adding termination appeals to this list is logistical. The purpose of the 2001 reduction of the supreme court's mandatory criminal jurisdiction was to allow the supreme court to devote adequate attention to shaping Indiana law in a variety of subject areas.<sup>51</sup> If termination orders continued to be issued with anything like the current frequency, mandatory supreme court jurisdiction over such orders would once again limit the court's ability to attend to the full spectrum of legal issues. It may, of course, be argued that the number of termination orders is itself problematic. However, the systemic

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49. This change might be easier to accomplish if accompanied by some systemic changes. The court has recently conducted a pilot program whereby termination appeals were assigned to a single staff attorney. Telephone Interview with Judge Melissa May, Indiana Court of Appeals, Fourth District (2010). The goal was presumably to develop expertise and increase efficiency. The court has decided to continue with this program, while leaving it up to each judge to decide whether to send termination appeals to that staff attorney. Such a concentration of responsibility for termination cases could be used to ease the transition to a more rigorous scrutiny of termination orders. In order to ensure a sufficiently thorough review of the record, two or more staff attorneys could focus on termination cases.

50. IND. R. APP. P. 4(A)(1)(a)–(d).

51. Kevin W. Betz & P. Jason Stephenson, *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 2002*, 36 IND. L. REV. 919, 919–20 (2003); Randall Shepard, *Why Changing the Supreme Court's Mandatory Jurisdiction is Critical to Lawyers and Clients*, 33 IND. L. REV. 1101, 1102–04 (2000).

changes necessary to achieve any substantial reduction in such orders would be complex, probably controversial and would take some time to accomplish.

Another possibility is for Indiana to adopt, for termination appeals, a procedure used in several other states in some or all equity cases: de novo appellate review of factual findings.

The Iowa Court of Appeals reviews all equity cases de novo.<sup>52</sup> The reviewing court is “obliged to examine the entire record and adjudicate rights anew on the issues properly presented.”<sup>53</sup> It has also been established that “especially when considering the credibility of witnesses, the court gives weight to the fact findings of the district court, but is not bound by them.”<sup>54</sup> Iowa’s appellate rules treat termination and “child-in-need-of-assistance” (CINA) cases differently from other appeals in some respects, with the differences generally aimed at expediting such appeals.<sup>55</sup> However, the de novo standard still applies.<sup>56</sup> In addition, the usual procedure allowing counsel to withdraw from what is considered a frivolous appeal does not apply in termination and CINA cases.<sup>57</sup>

Under Nebraska law,

In all appeals from the district court in suits in equity in which review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the court of appeals or the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions and, upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof.<sup>58</sup>

Juvenile cases, including termination cases, fall under this de novo review standard.<sup>59</sup> As in Iowa, the reviewing court gives some consideration to the trial court’s opportunity to observe witnesses.<sup>60</sup>

52. IOWA R. APP. P. 6.907.

53. *In re Marriage of Geil*, 509 N.W.2d 738, 740 (Iowa 1993).

54. IOWA R. APP. P. 6.904(3)(g); *see also In re K.C.*, 660 N.W.2d 29, 32 (Iowa 2003).

55. *See* IOWA R. APP. P. 6.101(1)(a), 6.101(2)(a), 6.102(1), 6.104(1)(b)(1), 6.201(1)–(2), 6.803(3)(b), 6.902(1) (also expediting certain other appeals, most of them involving children), 6.1103(1)(a), 6.1103(2)(a), 6.1208(2).

56. *See, e.g., In re S.J.*, 451 N.W.2d 827, 830 (Iowa 1990); *In re H.L.B.R.*, 567 N.W.2d 675, 677 (Iowa Ct. App. 1997); *In re J.R.*, 478 N.W.2d 409, 411 (Iowa Ct. App. 1991). In recent years, termination orders are typically reversed in unpublished decisions. *See, e.g., In re L.R.*, No. 09-1544 (Iowa Ct. App. Jan. 22, 2010); *In re S.C.*, No. 09-0779 (Iowa Ct. App. Jul. 22, 2009); *In re M.M.*, No. 02-1635 (Iowa Ct. App. Jan. 29, 2003).

57. IOWA R. APP. P. 6.1005(1).

58. NEB. REV. STAT. § 25-1925 (2004) (Scope of Review—in general); *see, e.g., Estate of McElwee v. Omaha Transit Auth.*, 664 N.W.2d 461, 466 (Neb. 2003). *But see State ex rel Medlin v. Little*, 703 N.W.2d 593, 597 (Neb. 2005).

59. *See, e.g., In re Kenna S.*, 766 N.W.2d 424, 429 (Neb. Ct. App. 2009); *In re Heather G.*, 664 N.W.2d 488, 497 (Neb. Ct. App. 2003).

Missouri applies an intermediate standard. While its appellate courts do not review equity judgments *de novo*, they may reverse such judgments if they are deemed “against the weight of the evidence.”<sup>61</sup>

“Appellate courts should exercise [this] power . . . with caution and with a firm belief that the decree or judgment is wrong.”<sup>62</sup> The reviewing courts generally defer to the trial court’s determinations of credibility.<sup>63</sup>

Tennessee, while describing its appellate review in non-jury cases as *de novo*, applies a standard similar to Missouri’s: “A reviewing court must review the trial court’s findings of fact *de novo* with a presumption of correctness under Tenn. R. App. P. 13(d).”<sup>64</sup> The courts have elaborated on this point, stating that “[i]n light of the heightened burden of proof in [termination of parental rights proceedings], the reviewing court must then make its own determination regarding whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, provide clear and convincing evidence that supports all the elements of the termination claim.”<sup>65</sup>

Oregon’s current approach is especially interesting. Until recently, Oregon provided *de novo* appellate review of all trial court decisions in equity cases.<sup>66</sup> For budgetary reasons,<sup>67</sup> Oregon’s Legislative Assembly amended section 19.415 to make such *de novo* review discretionary—*except* in appeals from judgments in termination of parental rights cases, where it remains mandatory.<sup>68</sup> This distinction suggests an implicit legislative finding that appellate review of a trial court’s factual findings is particularly crucial where parental rights are at stake.

The recent changes in Oregon highlight that *de novo* review is a costly solution. Indeed, any increase in appellate scrutiny will come at a cost. Constitutional protections always do.

#### V. STATUS OF IND. TRIAL RULE 52(A)

One technical question is whether any possible adjustment to appellate review of termination orders would require changes in Indiana Trial Rule 52(A). In pertinent part, that rule provides that

On appeal of claims tried by the court without a jury or with an advisory jury, at law or in equity, the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall

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60. *Heather G.*, 664 N.W.2d at 497.

61. See, e.g., *State ex rel. Nixon v. Karpierz*, 105 S.W.3d 487, 488 (Mo. 2003) (en banc); *In re Marriage of Hayes*, 288 S.W.3d 823, 825–26 (Mo. Ct. App. 2009); *Dallas v. Dallas*, 670 S.W.2d 535, 538, 540 (Mo. Ct. App. 1984).

62. *Dallas*, 670 S.W.2d at 538.

63. *Hayes*, 288 S.W.3d at 826.

64. *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010); see also *Dept. of Children’s Servs. v. Mims*, 285 S.W.3d 435, 447 (Tenn. Ct. App. 2008).

65. *Bernard T.*, 319 S.W.3d 596–97.

66. DAVID V. BREWER, CHANGES TO *DE NOVO* REVIEW IN THE OREGON COURT OF APPEALS 2 (OSB Appellate Practice Section CLE 2010).

67. *Id.*

68. OR. REV. STAT. § 19.415(3)(a), (b) (2009).

be given to the opportunity of the trial court to judge the credibility of the witnesses.<sup>69</sup>

Simply treating termination appeals like all other civil appeals would have no impact on Rule 52(A). Nor would any related reorganization of the court of appeals' support staff have such an impact. Nor would the (unlikely) alternative of giving the Indiana Supreme Court mandatory and exclusive jurisdiction over termination appeals under Indiana Appellate Rule 4(A)(1) affect Rule 52(A), since the rule does not refer to the court of appeals specifically.

A good argument can be made that Rule 52(A) offers no obstacle to de novo review in termination appeals. A showing of clear error must "leave[] [the court] with a firm conviction that a mistake was made."<sup>70</sup> There is nothing about this standard necessarily inconsistent with de novo review. (Missouri's intermediate approach, discussed above, allows reversal of a judgment as against the weight of the evidence when the reviewing court has "a firm belief that the decree or judgment is wrong"<sup>71</sup>—essentially the clear error standard.) However, reconciling de novo review with the clear error standard would require overruling existing case law stating that "findings of fact are clearly erroneous if the record lacks any evidence or reasonable inferences to support them."<sup>72</sup> In fact, the Indiana Supreme Court has recently moved in this direction.<sup>73</sup> As noted above, the jurisdictions employing de novo review do give some regard, arguably "due regard," to the trial court's opportunities to judge witness credibility.

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69. IND. R. TRIAL P. 52(A).

70. *Truax v. State*, 856 N.E.2d 116, 120 (Ind. Ct. App. 2006).

71. *Dallas v. Dallas*, 670 S.W.2d 535, 538 (Mo. Ct. App. 1984).

72. *In re T.W.*, 859 N.E.2d 1215, 1217 (Ind. Ct. App. 2006); *see also In re Adoption of A.S.*, 912 N.E.2d 840, 851 (Ind. Ct. App. 2009).

73. *See In re I.A.*, issued by the October 5, 2010, which noted the requirement of Ind. Code § 31-37-14-2 that "[a] finding in a proceeding to terminate parental rights must be based upon clear and convincing evidence," and found that "[t]o construe harmoniously the requirements of the statute and Rule 52(A), we hold that to determine whether a judgment terminating parental rights is clearly erroneous, we review the trial court's judgment to determine whether the evidence clearly and convincingly supports the findings and the findings clearly and convincingly support the judgment." 934 N.E.2d 1127, 1132. It should be noted that of the fourteen Court of Appeals memorandum decisions issued from October 6, 2010 to November 23, 2010 affirming termination orders, only one, *In re C.O.V.*, No. 79A02-1003-JT-445, 2010 WL 4217806, at \*3 (Ind. Ct. App. October 26, 2010), acknowledged the *I.A.* opinion in any way. Six of these memorandum decisions cited the familiar language in *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001) (discussing the "highly deferential standard of review in cases concerning the termination of parental rights"). *See In re E.Y. and L.Y.*, No. 54A01-1005-JT-229, 2010 WL 4034914, at \*2-3 (Ind. Ct. App. October 15, 2010); *In re C.H.*, No. 49A04-1003-JT-201, 2010 WL 4078433, at \*2-3 (Ind. Ct. App. October 19, 2010); *In re K.G.*, No. 02A03-1003-JT-341, 2010 WL 4130929, at \*2 (Ind. Ct. App. October 21, 2010); *In re D.M., Ja.M., & Je.M.*, No. 20A04-1003-JT-204, 2010 Ind. App. Unpub. LEXIS 1532, at \*7-8 (November 1, 2010); *In re S.M.*, No. 27A04-1005-JT-266, 2010 WL 4472182, at \*2 (Ind. Ct. App. November 9, 2010); *In re J.A.*, No. 20A03-1004-JT-228, 2010 WL 4600679, at \*2 (Ind. Ct. App. November 15, 2010).

Of course, it is likely that adoption of *de novo* review would either be accomplished by or followed by amendments to the Indiana Rules of Court. Trial Rule 52(A) could be clarified as part of this process.

#### CONCLUSION

The Indiana Court of Appeals does indeed, as it so often states, give special deference to trial court decisions to terminate parental rights. However, this deference did not result from any considered analysis and raises serious constitutional concerns. The similar special treatment of termination appeals under the Indiana Rules of Appellate Procedure potentially aggravates the problem.

It is time for our courts of review, our rulemaking bodies, and possibly our General Assembly to take another look at the appropriate level of appellate scrutiny for termination of parental rights and at how best to implement any changes. One alternative worth our attention is appellate *de novo* review. There may be other creative solutions, although probably none that come without some increased investment of judicial resources. This may be a necessary price to ensure adequate protection and respect for the fundamental and constitutionally protected bond between parent and child.